

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

09 NOV -4 PM 3: 86

BY RONALD R. CARPENTER

82374-0

CLERK

THE SUPREME COURT OF WASHINGTON

No. ~~82803-2~~

BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN,

Respondents,

v.

THE CITY OF MERCER ISLAND, a municipal corporation,

Respondent below,

and

KIM KOENIG, an individual, and LAWRENCE KOSS, an individual,
and ALTHEA PAULSON, an individual,

Appellants.

**BRIEF OF RESPONDENTS BAINBRIDGE ISLAND POLICE
GUILD AND STEVEN CAIN**

Robert L. Christie, WSBA #10895
Ann E. Mitchell, WSBA #39228
CHRISTIE LAW GROUP, PLLC
2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
Phone: (206) 957-9669
FAX: (206) 352-7875

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	2
III. STATEMENT OF THE ISSUES.....	8
IV. ARGUMENT.....	9
A. Washington's Public Records Act.....	9
B. The Requested Internal Investigation Materials Are Exempt from Disclosure Because Nondisclosure is Essential for the Protection of Officer Cain's Right to Privacy.....	10
1. The Requested Materials Are Highly Offensive to a Reasonable Person.....	10
2. The Requested Materials Are Not of Legitimate Concern to the Public.....	14
3. Disclosure of the Requested Records Will Violate Officer Cain's Privacy Rights, Regard- less of Whether His Name is Redacted	17
4. Officer Cain's Privacy Rights Are Not Diminished by Any Level of Public Disclosure	19
5. Officer Cain Has Not Waived His Right to Privacy.....	21
C. Disclosure is Not in the Public Interest and Would Irreparably Violate Officer Cain's Right to Privacy	23

	<u>Page</u>
D. The Requested Criminal Investigation Materials Are Exempt from Dissemination Under RCW 10.97.080.....	24
V. CONCLUSION.....	27

APPENDIX

A. Written Decision on Petitioner’s Motion for Injunctive Relief	
B. Order Granting Motion for Injunctive Relief to Prevent the Disclosure of Documents Requested Under RCW 42.56	
C. RCW 42.56.240(1)	
D. RCW 42.56.050(2)	
E. RCW 10.97.080	
F. RCW 10.97.030(2)	
G. RCW 10.97.030(1)	

TABLE OF AUTHORITIES

Table of Cases

	<u>Page</u>
<i>Ames v. City of Fircrest</i> , 71 Wn. App. 284, 857 P.2d 1083 (1993)	21
<i>Bellevue John Does 1-11 v. Bellevue School District</i> # 405, 129 Wn. App. 832, 120 P.3d 616 (Div. I 2005)	15, 19
<i>Bellevue John Does 1-11 v. Bellevue School District</i> No. 405, 164 Wn.2d 199, 189 P.3d 139 (2008)	2, 12, 13, 15-17, 19, 22
<i>Brouillet v. Cowles Pub'g Co.</i> , 114 Wn.2d 788, 793, 791 P.2d 526 (1990)	8, 9
<i>Burt v. Wash State Dept. Corr.</i> , 141 Wn. App. 573, 579-80, 170 P.3d 608 (2007)	8
<i>Columbia Publ'g. Co. v. City of Vancouver</i> , 36 Wn. App. 25, 671 P.2d 280 (1983)	20, 21
<i>Cowles Pub'g Co. v. The State Patrol</i> , 109 Wn.2d 712, 748 P.2d 597 (1988)	8, 10
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 796, 845 P.2d 995 (1993)	10
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 135, 580 P.2d 246 (1978)	9, 14
<i>Hudgens v. City of Renton</i> , 49 Wn. App. 842, 844, 746 P.2d 320 (1987)	24
<i>Morgan v. City of Federal Way</i> , 2009 Wn. LEXIS 734 (August 20, 2009)	13

	<u>Page</u>
<i>City of Seattle v. Klein</i> , 161 Wn.2d 554, 559, 116 P.3d 1149 (2007)	20
<i>Soter v. Cowles Publ'g Co.</i> , 162 Wn.2d 716, 757, 174 P.3d 60 (2007)	22
<i>City of Tacoma v. Tacoma News, Inc.</i> , 65 Wn. App. 140, 827 P.2d 1094 (1992, Division 2), <i>review</i> <i>denied</i> , 119 Wn.2d 1020, 838 P.2d 692 (1992).....	13, 14, 17

Statutes

RCW 10.97.030(1)	25
RCW 10.97.030(2)	24
RCW 10.97.080.....	7, 23-25
RCW 42.17	7
RCW 42.17.310(1)(d).....	18
RCW 42.56	7
RCW 42.56.001.....	7
RCW 42.56.040.....	15
RCW 42.56.050.....	2, 7, 9, 19, 23
RCW 42.56.070.....	7
RCW 42.56.230(2)	8, 9
RCW 42.56.240(1)	2, 5, 7, 8, 18, 23, 25
RCW 42.56.540.....	8, 22

I. INTRODUCTION

The Washington State Public Records Act enables citizens to access public records from state agencies. It promotes efficiency, transparency, and accountability in government. While the Act is to be construed liberally, the Legislature has crafted various exceptions under which specific public records are exempt from disclosure. In this case, appellants Kim Koenig, Lawrence Koss, and Althea Paulson requested from the City of Mercer Island its internal investigation materials related to Ms. Koenig's complaint of sexual misconduct against Bainbridge Island Police Officer Steve Cain. The prosecuting attorney's office declined to file any criminal charges against Officer Cain, and Ms. Koenig's complaint against Officer Cain was found to be unsubstantiated.

Both the Kitsap County Superior Court and the King County Superior Court have ruled that these internal investigation records are exempt from disclosure under the Public Records Act, because disclosure would violate Officer Cain's right to privacy. Disclosure would be highly offensive to a reasonable person, and the content of the requested materials is not of legitimate public concern. The Bainbridge Island Police Guild and Officer Cain respectfully request that this Court uphold the trial court's order and enjoin the City of Mercer Island from disclosing the requested materials to Ms. Koenig, Mr. Koss, Ms. Paulson, or any

other member of the public.

Furthermore, this case presents the Court with a clear opportunity to establish a bright line – something to guide public agencies subject to the Public Records Act and superior courts throughout the state asked to determine whether records are disclosable. Police agencies constantly receive requests for internal investigations and/or criminal investigations of alleged officer misconduct. Consistent with this Court’s opinion in *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008), the bright line that should be adopted is as follows: any investigation of alleged police sexual misconduct, whether criminal or “internal,” that results in a finding other than sustained should be exempt from public disclosure under RCW 42.56.240(1) and RCW 42.56.050 on the basis that disclosure would violate the officer’s right of privacy.

II. STATEMENT OF THE CASE

On September 30, 2007, Officer Steve Cain, along with other officers from the Bainbridge Island Police Department, responded to an incident involving Kim Koenig. (CP 49.) Ms. Koenig’s husband had been pulled over under suspicion of driving under the influence, and Ms. Koenig was hindering the police investigation. (CP 128.) Shortly after the incident occurred, Ms. Koenig lodged a formal complaint involving sexual

misconduct against Officer Cain with the Bainbridge Island Police Department. (CP 49.)

The Bainbridge Island Police Department accepts and investigates all complaints of employee misconduct and wrongdoing from any citizen or agency employee. (CP 49.) Formal complaints are forwarded up the chain of command to the Chief of Police, who decides who will investigate the complaint. The Chief may assign an investigator within the Department or request that another agency conduct the investigation. Generally, criminal investigations are handled by outside agencies. In the present case, then Bainbridge Island Police Chief Matt Haney asked the Puyallup Police Department to conduct a criminal investigation into Officer Cain's conduct. (*Id.*) He also requested that the Mercer Island Police Department conduct an internal investigation into Ms. Koenig's complaint. (*Id.*)

The Puyallup Police Department investigated Ms. Koenig's criminal allegations and forwarded its information to the Kitsap County Prosecuting Attorney for review. (CP 49; 64.) The Prosecutor declined to initiate any charges against Officer Cain, on the basis that there was "not sufficient evidence to establish that there was any inappropriate behavior by this police officer." (*Id.*)

Mercer Island Police Commander David Jokinen conducted the

internal investigation of Ms. Koenig's complaint. (CP 49; 66.) He completed his report on November 16, 2007, and recommended that the disposition of the investigation of Officer Cain's actions be "EXONERATED." (*Id.*)

After an internal investigation has taken place, the Chief reviews the investigation to determine completeness. If the complaint is non-criminal, the Chief will also prepare a report and include the disposition of each allegation. By letter dated January 22, 2008, Chief Haney informed Officer Cain that the internal investigations were complete. (CP 49-50; 58.) He told Officer Cain that the findings of each investigation were "unsubstantiated." (*Id.*) He then stated that he agreed with the agency findings and closed the investigation with the finding of "Unsubstantiated." (*Id.*)

In February 2008, the City of Bainbridge Island received multiple public records requests for the Mercer Island internal investigation materials and the Puyallup criminal investigation materials. (CP 50.) The City of Bainbridge Island allowed the first requestor, a journalist and appellant in this matter, Althea Paulson, to view the criminal investigation materials as non-conviction data, and informed her it would disclose the internal investigation materials absent an injunction or other legal action preventing disclosure. (*Id.*)

The Bainbridge Island Police Guild and Officer Cain then filed a

Complaint in the Kitsap County Superior Court to prevent disclosure of these requested materials, and on May 9, 2008, Judge Russell W. Hartman issued an oral opinion. (CP 50.) Before making his decision, Judge Hartman reviewed the requested documents *in camera*. (CP 81.) He stated in his oral opinion: "I did examine every page of both those [investigation files], and read with some care a great deal of what was in those documents as I did the examination." (CP 81-82.) On May 9, 2008, after full briefing by the parties, oral argument, and an *in camera* review, Judge Hartman ruled that disclosure of the requested documents, both the internal investigation and the criminal investigation materials, would violate Officer Cain's right to privacy. (CP 70-72; 89.) Accordingly, he ruled those records were exempt from disclosure under RCW 42.56.240(1).¹ (*Id.*)

By letter dated March 31, 2008, the City of Puyallup notified petitioners that an individual named Tristan Baurick requested disclosure of Puyallup's related criminal investigation materials. The City of Puyallup stated that it disagreed with the City of Bainbridge Island's interpretation of the criminal investigation file as "non-conviction data," and it intended to provide Mr. Baurick a copy of those materials absent a court order prohibiting such distribution. Puyallup did allow Mr. Baurick access to

¹ Judge Harman's ruling preceded this Court's decision in *Bellevue John Does*, issued on July 31, 2008. *Bellevue John Does*, 164 Wn.2d 199.

those records. At no time did the Bainbridge Island Police Guild or Officer Cain release, or authorize the release of, any of the police investigation materials relating to Ms. Koenig's complaint against Officer Cain.

Some time after Judge Hartman's decision, Ms. Koenig and Mr. Koss requested Puyallup's criminal investigation file directly from the City of Puyallup as well. (CP 50-51.) On July 18, 2008, the Bainbridge Island Police Guild and Officer Cain filed an *ex parte* motion for a temporary injunction requesting that the Pierce County Superior Court enjoin the City of Puyallup from disclosing the requested records until the petitioners could file a motion for injunctive relief on the Judge's calendar and litigate the issue on the merits. The Commissioner allowed Puyallup to disclose the records to Ms. Koenig and Mr. Koss, but ordered that they not disseminate those records in any way pending a full motion on the merits.

Accordingly, the Bainbridge Island Police Guild and Officer Cain filed a motion for permanent injunctive relief in the Pierce County Superior Court. Judge John Hickman reviewed the requested materials *in camera* and heard oral argument on September 19, 2008. On October 3, 2008, he entered his written decision, ruling that disclosure of the requested materials, even with Officer Cain's name redacted, would violate Officer Cain's right to

privacy.² (Appendix A.) Therefore, he exempted the records from disclosure under the Public Records Act.³ (*Id.*) Judge Hickman entered the order granting petitioners' motion for injunctive relief on October 17, 2008. (Appendix B.)

Shortly after filing the complaint with the Pierce County Superior Court, the Bainbridge Island Police Department received notice that Ms. Koenig, Mr. Koss, Ms. Paulson, and Mr. Baurick all requested the internal investigation into Ms. Koenig's complaint directly from the City of Mercer Island. (CP 51.) The City Attorney from Mercer Island was prepared to disclose the internal investigation files to the appellants unless a court ordered otherwise. (CP 51.) Therefore, on August 13, 2008, the Guild and Officer Cain filed their Complaint for Injunctive Relief in King County to prevent disclosure of the requested internal investigation materials. They filed their motion seeking injunctive relief on August 14, 2008. (CP 48-

² Judge Hickman had the benefit of this Court's July 31, 2008 decision in *Bellevue John Does*, 164 Wn.2d 199.

³ The Bainbridge Island Police Guild and Officer Cain have consistently argued the requested investigation materials are exempt under RCW 42.56.240(1), because they related to specific investigative records compiled by law enforcement agencies. Judge Hickman's written decision, filed in the Pierce County Superior Court, instead analyzes exemption under RCW 42.56.230(2) (attached as Appendix C), as related to personal information of public officials. (CP 257.) RCW 42.56.230(2) exempts from disclosure any "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." However, there is no material distinction between the two statutes in this case. The undisputed issue under either statute is whether disclosure of the requested materials would violate Officer Cain's right to privacy. The outcome is driven by the application of RCW 42.56.050, as detailed in this brief.

114.)

On January 30, 2009, after reviewing the briefing materials from each party and hearing oral argument, Judge Michael C. Hayden granted the Bainbridge Island Police Guild's and Officer Cain's motion for injunctive relief, and exempted the Mercer Island Police Department's internal investigation files from disclosure under the Public Records Act. (CP 244-245.) He permanently enjoined the City of Mercer Island from producing any of the requested materials to Ms. Koenig, Mr. Koss, Ms. Paulson, Mr. Baurick, or any other member of the public. (*Id.*) Appellants Ms. Koenig, Mr. Koss, and Ms. Paulson now seek review of this January 30, 2009, order. (CP 246-251.)

III. STATEMENT OF THE ISSUES

1. Did the King County Superior Court properly enjoin the City of Mercer Island from disclosing its internal investigation materials relating to Officer Cain, when disclosure would violate Officer Cain's privacy rights protected under RCW 42.56.240(1) and RCW 42.56.050?

2. If the Court finds that the internal investigation materials are not exempt from disclosure, and if the internal investigation materials contain the City of Puyallup's criminal investigation materials, should this Court enjoin Mercer Island from disseminating copies of the criminal investigation materials, when they constitute non-conviction data under

IV. ARGUMENT

A. **Washington's Public Records Act.**

Washington's Public Records Act governs the disclosure of public records possessed by public agencies. RCW 42.56.070.⁴ A person may receive a copy of requested public records unless an exemption to disclosure applies. *Id.* Exemptions are narrowly construed. *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990).

If an agency intends to disclose public records pursuant to the Public Records Act, an interested third party may object and seek judicial intervention to prevent disclosure. RCW 42.56.540; *Burt v. Wash. State Dept. Corr.*, 141 Wn. App. 573, 579-80, 170 P.3d 608 (2007). The party seeking to prevent disclosure has the burden to prove that the public records are exempt from disclosure. *Id.*, at 579-80.

Specific investigative records compiled by law enforcement agencies are exempt from disclosure if nondisclosure is "essential to effective law enforcement or for the protection of any person's right to privacy." RCW 42.56.240(1) (attached as Appendix C). The requested internal investigation materials in this case meet the first two requirements

⁴ On July 1, 2006, the legislature recodified the previous public records act, RCW 42.17, as RCW 42.56. RCW 42.56.001.

of this exemption; they are specific investigative records compiled by a law enforcement agency. *Cowles Pub'g Co. v. The State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988). Additionally, as set forth below, nondisclosure is necessary to protect Officer Cain's right to privacy.

B. The Requested Internal Investigation Materials Are Exempt from Disclosure, Because Nondisclosure is Essential for the Protection of Officer Cain's Right to Privacy.

A person's right to privacy is invaded or violated only if disclosure "(1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050 (attached as Appendix D). The court does not balance a person's privacy interest against the need for public accountability; the statute requires the party opposing disclosure to show the requested information is both highly offensive and not of legitimate public interest. *Brouillet*, 114 Wn.2d at 798. In this case, both criteria are met.

1. The Requested Materials Are Highly Offensive to a Reasonable Person.

The Public Records Act does not define "privacy" or information "highly offensive to a reasonable person." Therefore, the Court concluded that the Legislature intended the right of privacy to mean what it meant at common law. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978). It quoted the Restatement (Second) of Torts, which provides:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.

Id., at 136. The Court has since adopted the language of the Restatement (Second) Torts as the controlling definition of the right to privacy under the Public Records Act. *Cowles Publ'g Co.*, 109 Wn.2d at 720-21. The Court later explained that the right to privacy protects personal information that an individual "would not normally share with strangers."

Dawson v. Daly, 120 Wn.2d 782, 796, 845 P.2d 995 (1993).

The information contained in Mercer Island's internal investigation materials is highly offensive to a reasonable person, because it involves the investigation into unsubstantiated allegations of sexual misconduct of a police officer. Public knowledge of the details of the internal investigation into Ms. Koenig's complaint would embarrass Officer Cain and threaten his reputation, therefore impacting his effectiveness as a police officer. Further, the subject nature of the investigation is exactly the type of thing the Restatement (Second) of Torts intends to protect as

private: alleged sexual misconduct. Moreover, both the Mercer Island Police Commander Jokinen and the Bainbridge Island Police Chief Haney found the allegations against Officer Cain unsubstantiated. The unsubstantiated disposition, coupled with the offensiveness and embarrassing result of disclosure, demonstrates that this is the type of private information protected under the law. Put simply, this is the type of information any reasonable person would attempt to keep out of the public eye.

Judge Hartman agreed with this analysis. In his oral opinion, he stated:

First [petitioners] have to show that what is in the report would be highly offensive to a reasonable person. And I think that as to what is alleged by the victim, what the victim had to say about the conduct of the arresting officer, the answer to that question is clearly yes. ... So I think that the Police Guild has met the first element of the privacy test.

(CP 84-85.)

While Judge Hartman's decision was not binding on Judge Hayden, it was persuasive, especially because Judge Hartman fully reviewed the internal and criminal investigation files before issuing his opinion. The information in the internal investigation materials is highly offensive to a reasonable person and therefore meets the first prong of the

privacy exemption under the Public Records Act.

This Court's recent decision in *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008), supports this conclusion. In that case, the Court held that the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person. *Id.*, at 216. It reasoned in part that "[a]n unsubstantiated or false accusation of sexual misconduct is not an action taken by an employee in the course of performing public duties," and therefore teachers have a right to privacy in their identities. *Bellevue John Does*, 164 Wn.2d at 215. Further,

[t]he mere fact of the allegation of sexual-misconduct toward a minor may hold the teacher up to hatred and ridicule in the community, without any evidence that such misconduct ever occurred. The fact that a teacher is accused of sexual misconduct is a matter concerning the private life within the Hearst definition of the scope of the right to privacy.

Id. (internal citations omitted). Similarly, although police officers are public officials, they have protected privacy rights, and disclosure of information relating to an unsubstantiated allegation of sexual misconduct against them is highly offensive to a reasonable person.

2. The Requested Materials Are Not of Legitimate Concern to the Public.

The public does not have a legitimate concern in the identities of public officials who are the subject of unsubstantiated allegations of sexual misconduct. *Bellevue John Does*, 164 Wn.2d at 221; *see also Morgan v. City of Federal Way*, 166 Wn.2d 747, 756, 213 P.3d 596 (2009). The *Bellevue John Does* case was the first time this Court definitively ruled on this issue. In doing so, the Court relied on the analysis from a Division II case, *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 827 P.2d 1094 (1992, Division 2), *review denied*, 119 Wn.2d 1020, 838 P.2d 692 (1992). *Bellevue John Does*, 164 Wn.2d at 217.

In *Tacoma News*, the Morning News-Tribune sought access to a police incident report and related materials pursuant to the Public Disclosure Act. *Id.*, at 142. The police incident report concerned a citizen allegation that a parent had criminally abused a dependent minor. *Id.*, at 143. The allegation was investigated by several agencies, and each agency found the allegation “unsubstantiated.” *Id.* The Tribune believed the incident was related to a candidate for mayor and raised the possibility that the police may not have conducted a full and fair investigation. *Id.* The City did not disclose the incident report on the basis that it violated

individual privacy rights. *Id.*

Because the Legislature intended privacy under the Public Records Act to mean what it meant at common law, the *Tacoma News* court considered the privacy rights described in the Restatement (Second) of Torts. *Tacoma News*, 64 Wn. App. at 147-49, citing *Hearst Corp. v. Hoppe*, 90 Wn.2d at 135. It held that the common law allows public agencies to consider if information in public records is true or false when determining whether the records are of legitimate public concern within the meaning of the Public Records Act. *Id.*, at 149.

The *Tacoma News* court further held that, because agencies can consider whether information in requested public records is true or false, agencies can also consider whether such information has been substantiated. *Tacoma News*, 65 Wn. App. at 149. "If information remains unsubstantiated after reasonable efforts to investigate it, that fact is indicative though not always dispositive of falsity." *Id.*

Ultimately, the *Tacoma News* court upheld the trial court's finding that the police incident report was not of legitimate public concern and was therefore exempt from disclosure. *Tacoma News*, 65 Wn. App. at 151-52. The court based its ruling on the fact that three separate agencies investigated the allegations and all found it to be unsubstantiated. *Id.*, at 151-52. Similarly, the allegations against Officer Cain have been found

unsubstantiated, and are therefore not of legitimate concern to the public. (CP 87.) Therefore, this Court should rule that the requested internal investigation materials are not of legitimate public concern, and are exempt from disclosure under RCW 42.56.040.

The *Bellevue John Does* decision also overruled the holding in *Bellevue John Does 1-11 v. Bellevue School District # 405*, 129 Wn. App. 832, 120 P.3d 616 (Div. I 2005), upon which appellants previously relied. The appellate court reasoned the public has a legitimate public concern in the identities of public officials who are the subject of unsubstantiated allegations, because “unsubstantiated” only means that an investigator was unable to reach a firm conclusion about what really happened, and there is a possibility the conduct actually occurred. *Id.*, at 856. It held that only patently false claims are not of legitimate public concern. *Id.*, at 858. This Court, however, found that making a distinction between unsubstantiated and patently false allegations is “vague and impractical.” *Bellevue John Does*, 164 Wn.2d at 218. “Placing the burden on agencies and courts to determine whether allegations are patently false rather than simply unsubstantiated is unworkable, time consuming, and, absent specific rules and guidelines, likely to lead to radically different methods and conclusions.” *Id.* When an allegation is unsubstantiated, the identity of the public official is not of legitimate public concern. *Id.*, at 221.

Moreover, *Bellevue John Does* clearly held that the issue of whether an investigation was adequate does not justify disclosure.

Bellevue John Does, 164 Wn.2d at 221-22. Such a rule

fails to adequately protect teachers' privacy rights and incorrectly presumes that the presence of an allegation is indicative of increased likelihood of misconduct. Whether or not there was an adequate investigation should not, as a policy matter, determine the accused's right to privacy because the accused has no control over the adequacy of the investigation.

Id., at 221. If Ms. Koenig, Mr. Koss, or Ms. Paulson were truly concerned about the overall adequacy of the internal investigations and/or criminal investigations into police sexual misconduct, they would have requested more than just the investigations into Officer Cain's conduct. They would have at least requested materials relating to other alleged police sexual misconduct. Under *Bellevue John Does*, Officer Cain has a recognized right to privacy in this matter, which will necessarily be violated if the City of Mercer Island discloses the requested records.

3. Disclosure of the Requested Records Will Violate Officer Cain's Privacy Rights, Regardless of Whether His Name is Redacted.

Absent full disclosure, Ms. Koenig, Mr. Koss, and Ms. Paulson request disclosure of the internal investigation file with Officer Cain's name redacted, the same way the teachers' names were redacted in the

records requested in the *Bellevue John Does* case. However, the *Bellevue John Does* decision does not support such a request. The school districts in the *Bellevue John Does* case had voluntarily provided the entire set of requested records, with only teachers' names and identifying information redacted. *Bellevue John Does*, 164 Wn.2d at 217, n. 19. The issue in front of the Court was whether the names of the unidentified public school teachers subject to unsubstantiated allegations of sexual misconduct were exempt from disclosure. *Id.*, at 208.

Furthermore, redacting the teachers' names from the requested records in *Bellevue John Does* made sense; because so many records were requested, the identities of the teachers would remain protected. This is not true in the present case. Respondents requested the internal investigation file related to *Officer Cain's* conduct. Redacting his name and disclosing the records does no more than present a fill-in-the-blanks exercise for appellants and necessarily publicizes the identity of Officer Cain.

In short, the *Bellevue John Does* Court did not consider whether disclosure of an entire set of records would violate privacy rights protected under RCW 42.56.050, even if the names of the teachers with unsubstantiated allegations of sexual misconduct were redacted. *Bellevue John Does*, 164 Wn.2d at 217, n. 19. However, the *Tacoma News* court

did. *Tacoma News, Inc.*, 65 Wn. App. at 151-52. In that case, the court held that an entire set of documents was exempt from disclosure under the Public Disclosure Act, because the allegations were unsubstantiated, and disclosure would violate the privacy rights of the people involved.⁵ *Id.*, at 143; 151. The *Tacoma News* court considered and denied the newspaper's request for a copy of the records with the names of the alleged victim and informant redacted. *Id.*, at 152. It reasoned: "First, whatever information was not redacted would continue to be unsubstantiated and not of legitimate concern to the public. Second, identification of [one individual] would inevitably lead to the identification of others allegedly involved." *Id.*, at 152-53.

Similarly, the allegations against Officer Cain were unsubstantiated, and therefore no portions of the investigation materials are of legitimate public concern. Because his involvement in this incident is known to the public, disclosing the records with his name redacted is a hollow exercise that does nothing to protect his identity or his right to privacy.

4. Officer Cain's Privacy Rights Are Not Diminished by Any Level of Public Disclosure.

Ms. Koenig, Mr. Koss, and Ms. Paulson assert, without citing to

⁵ The *Tacoma News* court analyzed whether disclosure would violate privacy rights under former RCW 42.17.310(1)(d), which is substantively identical to current RCW 42.56.240(1).

any supporting authority, that because various media outlets have revealed Officer Cain's identity, he no longer has a protected right to privacy. They suggest that because Ms. Paulson and other journalists chose to drag Officer Cain's name through the mud, he is no longer afforded protection under the law. Appellants offer no case law to support their bizarre contention. Their supposition that this Court's decision in the *Bellevue John Does* case turns on the fact that the identities of the teachers were unknown to the public is meritless. This Court's analysis in *Bellevue John Does* surrounds the privacy exception to the Public Records Act, 42.56.050, a statute the appellants noticeably failed to cite anywhere in their opening brief.

RCW 42.56.050 protects a person's right to privacy if disclosure of records would be highly offensive to a reasonable person and is not of legitimate public concern. The level of public discourse surrounding the requested records is completely immaterial to these elements. That is particularly true here, where Officer Cain, the victim of these disclosures, had no involvement in seeking media attention or promoting his side of the story publicly. He has been consistent in his effort to preserve his right of privacy. Media obsession over Ms. Koenig's complaint does not strip Officer Cain of his legal right to privacy, and the Court should enjoin any further disclosure of these investigative materials by affirming the trial

court's order.

5. Officer Cain Has Not Waived His Right to Privacy.

Ms. Koenig, Mr. Koss, and Ms. Paulson also assert that Officer Cain waived his right to privacy, because he did not immediately obtain a court order preventing the City of Puyallup from disclosing its criminal investigation file, and media outlets have since reported about the contents of those materials. This argument is baseless. A person's right to privacy does not hinge on his or her ability to fully understand the law and seek immediate and costly legal representation to prevent disclosure or distribution of private information. Waiver requires an individual to intentionally relinquish or abandon a known right. *City of Seattle v. Klein*, 161 Wn.2d 554, 559, 116 P.3d 1149 (2007). At no time did Officer Cain intentionally relinquish or abandon his right to privacy. Quite the contrary, he has been consistent in his battle to preserve his right in the face of multiple legal challenges.

Columbia Publ'g. Co. v. City of Vancouver, 36 Wn. App. 25, 671 P.2d 280 (1983), is not on point. In that case, the local police union met and voted no confidence in the chief of police. *Id.*, at 282. The union immediately issued a press release expressing concerns, and it gave copies of the press release to the city manager and provided him with 13 statements of individual officers detailing specific complaints. *Id.* The

statements were confidential, but the city manager was given a key to identify the writers and conduct follow-up interviews. *Id.* A reporter at the *Columbian* submitted a public records request for copies of the 13 complaints, and the court ultimately permitted disclosure. *Id.*, at 282-83.

The *Columbia Publ'g. Co.* court held that the privacy exemption in the Public Records Act did not apply, because the contents of the complaints were not highly offensive, and they related to a matter of public concern: the police chief's job performance. *Columbia Publ'g. Co.*, 36 Wn. App. at 283-84. Further, the court held that the police union waived any claim to privacy by its individual members by choosing to "go public" with its complaints. *Id.*, at 284. Neither the Bainbridge Island Police Guild nor Officer Cain "went public" with any of the information contained in the Mercer Island internal investigation file or the Puyallup criminal investigation file. Further, disclosure would violate Officer Cain's right to privacy, something even a police officer has the right to preserve.

Ames v. City of Fircrest, 71 Wn. App. 284, 857 P.2d 1083 (1993), is also inapplicable. There, the court held that Mr. Ames was unable to demonstrate that nondisclosure of requested materials was essential to effective law enforcement, and therefore he could not show an exemption to the Public Records Act applied. *Id.*, at 294. The court did not consider

a privacy exemption, nor did it consider whether Mr. Ames waived his right to privacy. *Id.*, at 296. Officer Cain has not waived his right to privacy, and therefore the Court should uphold the trial court's order and enjoin the City of Mercer Island from disclosing the requested internal investigation materials to Ms. Koenig, Mr. Koss, Ms. Paulson, or any other member of the public.

C. Disclosure Is Not in the Public Interest and Would Irreparably Violate Officer Cain's Right to Privacy.

In order to enjoin the release of public records, the trial court must find that a specific exemption under the Public Records Act applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government function. RCW 42.56.540; *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007). Here, the requested records are exempt from disclosure under 42.56.240(1). The Court may enjoin their release, because disclosure is not in the public interest and would substantially and irreparably damage Officer Cain's right to privacy.

This Court has clearly held that the public does not have a legitimate concern in the identities of public officials who are the subject of unsubstantiated allegations of sexual misconduct. *Bellevue John Does*, 164 Wn.2d at 221. Therefore, disclosure of the criminal investigation

materials is not in the public interest. Additionally, disclosure would substantially and irreparably damage Officer Cain's right to privacy. While the City of Puyallup previously released the criminal investigation materials, Officer Cain has since invoked his right to privacy and taken every effort to prevent further dissemination of these highly offensive materials. Given the immense amount of media coverage Ms. Koenig's complaint previously generated, it is likely that disclosure of the materials will initiate additional media attention and further violate Officer Cain's right to keep these matters private.

The Legislature expressly protected Officer Cain's right to privacy when it enacted RCW 42.56.240 and RCW 42.56.050. Disclosure of the requested records in this case will violate that right and circumvent the legislative intent behind the Public Records Act. Because further dissemination of these records is not in the public interest and would substantially and irreparably violate Officer Cain's right to privacy, the Bainbridge Island Police Guild and Officer Cain respectfully request that this Court uphold the trial court's decision and rule that the internal investigation materials are exempt from disclosure.

D. The Requested Criminal Investigation Materials Are Exempt from Dissemination Under RCW 10.97.080.

Appellants contend that City of Mercer Island's internal

investigation file contains a copy of the City of Puyallup's criminal investigation file. Despite that it is part of the internal investigation file, the criminal investigation file is exempt from disclosure for the very same reasons the internal investigation file is exempt: disclosure would violate Officer Cain's right to privacy, because the information contained therein is highly offensive to a reasonable person and is not of legitimate concern to the public.

Should this Court find that internal and criminal investigation materials are disclosable under the Public Records Act, and if the internal investigation files contain Puyallup's criminal investigation materials, dissemination of the criminal investigation file is still exempt under Washington's Criminal Records Privacy Act, RCW 10.97, *et seq.* RCW 10.97.080 states:

No person shall be allowed to retain or mechanically reproduce any nonconviction data except for the purpose of challenge or correction when the person who is the subject of the records asserts the belief in writing that the information regarding such person is inaccurate or incomplete. ***The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying of nonconviction data for any other purpose.***

RCW 10.97.080 (emphasis added) (attached as Appendix E). *See also*, *Hudgens v. City of Renton*, 49 Wn. App. 842, 844, 746 P.2d 320 (1987),

(RCW 10.97 precludes the copying or retaining of nonconviction information, and exempts such information from the disclosure requirements of the Public Records Act.). “Non conviction data’ consists of all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending.” RCW 10.97.030(2) (attached as Appendix F). Further, an “individual’s right to access and review of criminal history record information shall not extend to data contained in intelligence, investigative, or other related files, and shall not be construed to include any information other than that defined as criminal history record information by this chapter.” RCW 10.97.080.

“Criminal record history information” means

information contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release.

RCW 10.97.030(1) (attached as Appendix G). The term includes “information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide

individual identification of a person together with any portion of the individual's record of involvement in the criminal justice system as an alleged or convicted offender." *Id.*

Because both the Kitsap County Superior Court and the Pierce County Superior Court ruled that the criminal investigation materials are exempt from disclosure under RCW 42.56.240(1), neither reached the issue whether those materials constitute non-conviction data. In the event this Court holds the requested internal investigation materials are somehow disclosable under the Public Records Act, the criminal investigation materials contained therein constitute non-conviction data, because they relate to criminal allegations against Officer Cain that did not lead to a conviction or other disposition adverse to him. RCW 10.97.080 prohibits the City of Mercer Island from providing copies or otherwise disseminating these criminal investigation materials to Ms. Koenig, Mr. Koss, Ms. Paulson, or any other member of the public.

V. CONCLUSION

The Legislature specifically created an exemption to the Public Records Act when nondisclosure of documents is essential for the protection of an individual's privacy rights. While appellants make a variety of arguments in an attempt to get around this firmly established exemption, the law is clear. A person's right to privacy is invaded or violated when

disclosure would be highly offensive to a reasonable person, and when disclosure is not of legitimate concern to the public.

Here, Ms. Koenig, Mr. Koss, and Ms. Paulson do not dispute that the content of the Mercer Island internal investigation file is highly offensive to a reasonable person, or that the content of the requested materials is not of legitimate concern to the public. Instead, they argue that because the media identified Officer Cain's involvement in the underlying incident, and because Officer Cain did not seek injunctive relief soon enough, somehow Officer Cain's right to privacy is no longer protected. Appellants' arguments are unsupported by legal authority, fail to address the statutory law applicable to this issue, and unjustly attempt to strip Officer Cain of his protected rights.

Disclosure of the requested materials would violate Officer Cain's right to privacy. The Bainbridge Island Police Guild and Officer Cain respectfully request that this Court establish the clear bright line, uphold the trial court's order, and enjoin the City of Mercer Island from disclosing the requested materials to Ms. Koenig, Mr. Koss, Ms. Paulson, or any other member of the public.

Even if the event the Court finds disclosure appropriate under the Public Records Act, the Guild and Officer Cain request that this Court prohibit Mercer Island from providing copies or otherwise disseminating

the criminal investigation materials contained in the internal investigation file to Ms. Koenig, Mr. Koss, Ms. Paulson, or any other member of the public, because they constitute non-conviction data.

Respectfully submitted this 3rd day of November, 2009.

CHRISTIE LAW GROUP, PLLC

By Ann Mitchell
ROBERT L. CHRISTIE, WSBA #10895
ANN E. MITCHELL, WSBA #39228
Attorneys for Respondents Bainbridge
Island Police Guild and Steven Cain

2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
Telephone: (206) 957-9669
Facsimile: (206) 352-7875

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

09 NOV -4 PM 3:07

CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER
CLERK

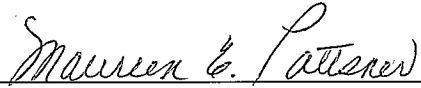
I certify that on November 3, 2009, I caused this document to be served on the following in the manner described:

John Muenster
MUENSTER & KOENIG
1111 - 3rd Avenue, Suite 2220
Seattle, WA 98101
Attorney for Appellants
Via E-mail and Messenger

Daniel P. Mallove
LAW OFFICE OF DANIEL P. MALLOVE, PLLC
2003 Western Avenue, Suite 400
Seattle, WA 98121
Attorney for Althea Paulson
Via E-mail and Messenger

Jeffrey S. Myers
Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508-1880
Attorney for City of Mercer Island
Via E-mail and Messenger

Dated this 3rd day of November, 2009.


MAUREEN E. PATTSNER

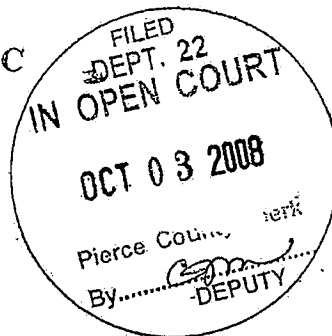
APPENDIX

APPENDIX A

Christie Law Group, PLLC

OCT 07 2008

Copy
Received



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

BAINBRIDGE ISLAND POLICE GUILD;
and STEVEN CAIN,

Petitioners,

vs.

CITY OF PUYALLUP, a Municipal
Corporation; KIM KOENIG, an
individual; and LAWRENCE KOSS,
an individual,

Respondents.

Cause No: 08-2-10453-8

WRITTEN DECISION ON
PETITIONER'S MOTION
FOR INJUNCTIVE RELIEF

THIS MATTER having come before the above-entitled Court on the 19th day of September, 2008, by way of motion by the Petitioners, BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN. The Petitioners, BAINBRIDGE ISLAND POLICE GUILD and STEVEN CAIN, being represented by Attorney Robert L. Christie. The Respondent, CITY OF PUYALLUP, a municipal corporation, being represented by Attorney Steve M. Kinkelie. The Respondents, KIM KOENIG and LAWRENCE KOSS, being represented by Attorney John R. Muenster. The Court having heard oral argument presented by all

1 parties, as well as reviewing the records and files contained
2 herein, took the matter under advisement to further research and
3 read the pleadings and case law cited by all counsel.

4 Wherefore, the Court makes the following written decision:

5 BACKGROUND

6 This Court will not get into every factual allegation
7 regarding the particulars of this motion since the parties are
8 obviously acquainted with the fact pattern. That background,
9 which I believe is important for purposes of my decision, will
10 be incorporated into the legal analysis.

11 LEGAL ANALYSIS

12 It would appear that all parties agree that the
13 controlling decision in this case is *Bellevue John Does 1-11 v.*
14 *Bellevue School District No. 405, 2008 WL 2929683 (2008)*. The
15 Court would agree to this assertion.

16 The Honorable Russell W. Hartman, Kitsap County
17 Superior Court judge, in issuing his decision on May 9, 2008
18 regarding a similar injunctive request as it applied to the City
19 of Bainbridge Island, relied predominantly on *The City of Tacoma*
20 *v. Tacoma News, Inc., 65 Wn. App. 140; 827 P.2d 1094 (1992)* and
21 the decision by the Court of Appeals in *Bellevue John Does 1-11*
22 *v. Bellevue School District No. 405*, when it was at the
23
24
25

1 appellate level. As the parties know, the Washington State
2 Supreme Court, in *Bellevue John Does 1-11 v. Bellevue School*
3 *District No. 405*, affirmed and reversed, in part, the decision
4 of the appellate court.

5 The factual pattern, in *Bellevue John Does 1-11 v.*
6 *Bellevue School District No. 405*, is very similar to the factual
7 pattern in the case before this Court. In *Bellevue John Does 1-*
8 *11*, the issue presented to the Supreme Court was the request for
9 records with regard to allegations of sexual abuse by a number
10 of public school teachers against school students. Division I,
11 of the Court of Appeals, ordered that the teachers' identities
12 be disclosed unless the allegations of misconduct were "patently
13 false". In this case, we have allegations by a private citizen
14 of alleged sexual misconduct against a Bainbridge Island police
15 officer. This Court finds that the Bainbridge Island police
16 officer, in this situation, is in the same position as the
17 public school teachers in *Bellevue John Does 1-11*, in that they
18 are each public employees for purposes of the Washington's
19 Public Disclosure Act (PDA).
20

21 This Court recognizes, as the Supreme Court did in
22 *Bellevue John Does 1-11*, that the policy behind the PDA is to
23 ensure full access to information concerning the conduct of
24 government on every level" RCW 42.17.010 (11). The Supreme
25

1 Court further emphasized the fact that the Court should err on
2 the side of disclosure and review any claimed exemptions on a
3 narrow basis.

4 The exception being claimed in this case is the same
5 as *Bellevue John Does 1-11*, in that the PDA exempts from
6 disclosures "personal information and files maintained for
7 employees, appointees, or elected officials of any public agency
8 to the extent that disclosure would violate their right to
9 privacy" RCW 42.56.230 (2). In order to determine whether this
10 exemption applies, the Court must analyze the following factors:
11

12 1) Whether the allegations constitute personal
13 information;

14 2) Whether the police officer has a right to privacy
15 in his identity; and

16 3) Whether disclosure of the police officer's identity
17 would violate his right to privacy.

18 The Court finds that the identity of this police
19 officer with regard to the allegations against him, as a result
20 of the alleged behavior of sexual misconduct, are clearly
21 "personal information" because they obviously relate to a
22 particular identifiable individual.

23 The Court must then determine whether the police
24 officer, in this particular case, has a right to privacy in such
25

1 personal information. The Court, in *Bellevue John Does 1-11*,
2 clearly indicated that the teachers who were subject to
3 unsubstantiated allegations of sexual misconduct did in fact
4 have a right to privacy as to their identities. The Supreme
5 Court found that such disclosure would be highly offensive to a
6 reasonable person and is not of legitimate concern to the
7 public. The Supreme Court differentiated between substantiated
8 and unsubstantiated or false accusations of sexual misconduct.
9 The Supreme Court, in distinguishing the public interest as to
10 substantiated allegations v. unsubstantiated allegations, found
11 that there was no public interest in disclosing unsubstantiated
12 allegations and that such disclosure would in fact violate a
13 teacher's right to privacy. The Court reasoned that
14 unsubstantiated allegations of sexual misconduct is highly
15 offensive to a reasonable person and that said unsubstantiated
16 allegations are not a matter of legitimate public interest. The
17 opposite would be true if the allegations were found to be
18 substantiated.
19

20 This Court makes a similar analysis in applying the
21 facts of the case to the fact pattern in *Bellevue John Does 1-11*
22 *v. Bellevue School District No. 405*. This Court further does
23 not adopt the standard, as indicated in the Court of Appeals'
24 decision, that these allegations must be "patently false". This
25

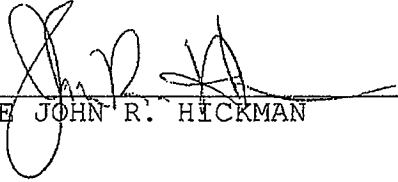
1 Court finds that the report completed by the City of Puyallup
2 Police Department, as well as the recommendation made by the
3 Kitsap County prosecutor not to pursue charges against this
4 officer, qualify under the definition of "unsubstantiated" as
5 defined in *Bellevue John Does 1-11*. This Court further finds
6 that the disclosure of the officer's identity does not aid in
7 effective government oversight by the public and the officer's
8 right to privacy does not depend on the quality of the City of
9 Puyallup Police Department's investigation of this alleged
10 incident.
11

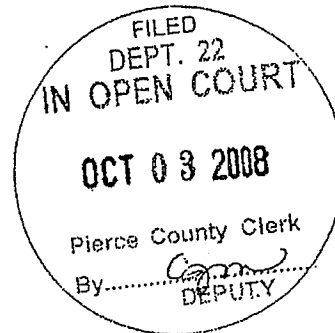
12 Further, this Court finds that the disclosure of this
13 material being requested by the Respondents, KIM KOENIG and
14 LAWRENCE KOSS, would not sufficiently protect the right of
15 privacy to this officer even if his name was redacted from said
16 reports. Based on the detailed information contained within the
17 reports, as well as the attached documents and statements
18 compiled during the criminal investigation, the redaction of the
19 officer's name would serve no purpose since it would take little
20 or no imagination to determine the identity of the actual
21 officer involved.
22

23 Wherefore, based on the in-camera review of the
24 investigatory materials provided to me by the City of Puyallup's
25 counsel, as well as the authority and memorandum provided by the

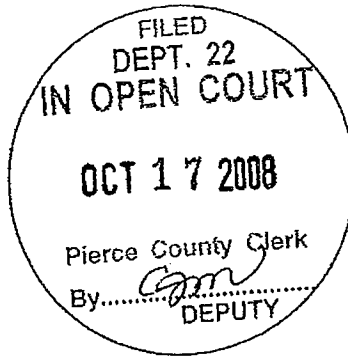
1 moving party, the Court hereby grants the Petitioner's motion
2 for injunctive relief. The Court requires the moving party to
3 prepare on order consistent with this ruling and note a time for
4 presentment of an order on the Court's Friday motion calendar.

5 DATED this 3 day of October, 2008.

6
7 
8 JUDGE JOHN R. HICKMAN



APPENDIX B



HONORABLE JOHN R. HICKMAN

7
8
9
10
11
12
13
14

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

BAINBRIDGE ISLAND POLICE GUILD;
and STEVEN CAIN,

Petitioners,

v.

The CITY OF PUYALLUP, a Municipal
Corporation; KIM KOENIG, an individual; and
LAWRENCE KOSS, an individual,

Respondents.

NO. 08-2-10453-8

ORDER GRANTING MOTION FOR
INJUNCTIVE RELIEF TO PREVENT
THE DISCLOSURE OF DOCUMENTS
REQUESTED UNDER RCW 42.56

15
16
17
18
19
20
21

THIS MATTER came regularly before this Court on petitioners' Motion for Injunctive Relief to Prevent the Disclosure of Documents Requested under RCW 42.56. The Court reviewed the pleadings and files in this matter, specifically including the following:

1. Petitioners' Motion for Injunctive Relief to Prevent the Disclosure of Documents Requested Under RCW 42.56, with attachments;
2. Supplemental Briefing in Support of Motion for Injunctive Relief to Prevent the Disclosure of Documents Requested Under RCW 42.56;
3. Respondent Koenig's and Koss's Memorandum in Opposition to Petitioners' Motion for Injunctive Relief;

ORDER GRANTING MOTION FOR INJUNCTIVE
RELIEF TO PREVENT THE DISCLOSURE OF
DOCUMENTS REQUESTED UNDER
RCW 42.56 - 1

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

4. Declaration and Amended Declaration of Muenster in Opposition to Petitioners' Motion for Injunctive Relief;
5. Declaration of Respondent Koenig in Opposition to Petitioners' Motion for Injunctive Relief;
6. Respondent City of Puyallup's Response to Petitioners Motion for Injunctive Relief;
7. Petitioners' Reply in Support of Petitioners' Motion for Injunctive Relief to Prevent the Disclosure of Documents Requested Under RCW 42.56;
8. Petitioners' Motion to Strike Portions of Koenig's and Paulson's Declarations;
9. Respondents Koenig and Koss's Memorandum in Opposition to Petitioners' Motion to Strike Portions of Koenig and Paulson Declaration;
10. Petitioners' Reply in Support of Motion to Strike Portions of Koenig's and Paulson's Declarations;
11. The requested records, reviewed *in camera*;

On September 19, 2008 the Court heard argument of all counsel and on October 3, 2008 issued a WRITTEN DECISION ON PETITIONER'S MOTION FOR INJUNCTIVE RELIEF, ~~a copy of which is appended hereto.~~

Based upon the foregoing, and being otherwise fully advised in this matter;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioners' Motion for Injunctive Relief to Prevent the Disclosure of Documents Requested under RCW 42.56 is GRANTED and:

1. The City of Puyallup is permanently enjoined from producing any of the criminal investigation file relating to Officer Steve Cain to Ms. Koenig, Mr. Koss, or any other member of the public.

ORDER GRANTING MOTION FOR INJUNCTIVE
RELIEF TO PREVENT THE DISCLOSURE OF
DOCUMENTS REQUESTED UNDER
RCW 42.56 - 2

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

2. Ms. Koenig and Mr. Koss must, within ⁵ days from the date of this order, deliver to petitioner's attorney, Robert L. Christie, all documents previously produced to them by the City of Puyallup from the criminal investigation file. Both are prohibited from keeping any copies of the materials. Both must file a certification with the court confirming that they have delivered the documents to Mr. Christie in accordance with this order.

3. All respondents are permanently enjoined from disseminating the ^{Documents} information ~~provided by the City of Puyallup~~ contained in those documents to any member of the public.

DONE IN OPEN COURT/CHAMBERS this 17 day of Oct, 2008.

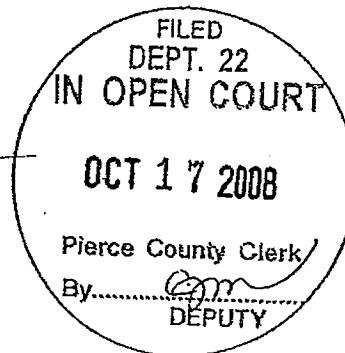
HONORABLE JOHN R. HICKMAN, Judge

Presented by:

CHRISTIE LAW GROUP, PLLC

By

ROBERT L. CHRISTIE, WSBA #10895
Attorneys for Petitioners



ORDER GRANTING MOTION FOR INJUNCTIVE
RELIEF TO PREVENT THE DISCLOSURE OF
DOCUMENTS REQUESTED UNDER
RCW 42.56 - 3

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

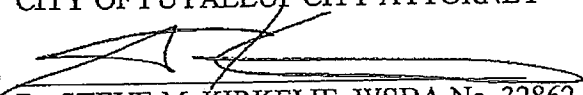
1 Approved for Entry, Notice of Presentation Waived by:

2 MUENSTER & KOENIG

3
4 By JOHN R. MUENSTER, WSBA No. 6237
Attorney for Respondents Koenig and Koss

5
6 Approved for Entry, Notice of Presentation Waived by:

7 CITY OF PUYALLUP CITY ATTORNEY

8 
9 By STEVE M. KIRKELIE, WSBA No. 32862
Attorney for Respondent City of Puyallup

10
11
12
13
14
15
16
17
18
19
20
21
ORDER GRANTING MOTION FOR INJUNCTIVE
RELIEF TO PREVENT THE DISCLOSURE OF
DOCUMENTS REQUESTED UNDER
RCW 42.56 - 4

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

RCW 42.56.240(1)

Investigative, Law Enforcement and Crime Victims.

The following investigative, law enforcement and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the non-disclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

APPENDIX C

RCW 42.56.050(2)

Invasion of Privacy, When.

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

APPENDIX D

RCW 10.97.080

Inspection of information by subject — Challenges and corrections.

All criminal justice agencies shall permit an individual who is, or who believes that he may be, the subject of a criminal record maintained by that agency, to appear in person during normal business hours of that criminal justice agency and request to see the criminal history record information held by that agency pertaining to the individual. The individual's right to access and review of criminal history record information shall not extend to data contained in intelligence, investigative, or other related files, and shall not be construed to include any information other than that defined as criminal history record information by this chapter.

Every criminal justice agency shall adopt rules and make available forms to facilitate the inspection and review of criminal history record information by the subjects thereof, which rules may include requirements for identification, the establishment of reasonable periods of time to be allowed an individual to examine the

record, and for assistance by an individual's counsel, interpreter, or other appropriate persons.

No person shall be allowed to retain or mechanically reproduce any nonconviction data except for the purpose of challenge or correction when the person who is the subject of the record asserts the belief in writing that the information regarding such person is inaccurate or incomplete. The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying of nonconviction data for any other purpose.

The Washington state patrol shall establish rules for the challenge of records which an individual declares to be inaccurate or incomplete, and for the resolution of any disputes between individuals and criminal justice agencies pertaining to the accuracy and completeness of criminal history record information. The Washington state patrol shall also adopt rules for the correction of criminal history record information and the dissemination of corrected information to agencies and persons to whom inaccurate or incomplete information was previously disseminated. Such rules may establish time

limitations of not less than ninety days upon the
requirement for disseminating corrected information.

APPENDIX E

RCW 10.97.030(2)

Definitions.

(2) “Nonconviction data” consists of all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending. There shall be a rebuttable presumption that proceedings are no longer actively pending if more than one year has elapsed since arrest, citation, charge, or service of warrant and no disposition has been entered.

APPENDIX F

RCW 10.97.030(1)

Definitions.

For purposes of this chapter, the definitions of terms in this section shall apply.

(1) "Criminal history record information" means information contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release.

The term includes information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide individual identification of a person together with any portion of the individual's record of involvement in the criminal justice system as an alleged or convicted offender, except:

(a) Posters, announcements, or lists for identifying or apprehending fugitives or wanted persons;

(b) Original records of entry maintained by criminal justice agencies to the extent that such records are compiled and maintained chronologically and are accessible only on a chronological basis;

(c) Court indices and records of public judicial proceedings, court decisions, and opinions, and information disclosed during public judicial proceedings;

(d) Records of traffic violations which are not punishable by a maximum term of imprisonment of more than ninety days;

(e) Records of any traffic offenses as maintained by the department of licensing for the purpose of regulating the issuance, suspension, revocation, or renewal of drivers' or other operators' licenses and pursuant to RCW 46.52.130;

(f) Records of any aviation violations or offenses as maintained by the department of

transportation for the purpose of regulating pilots or other
aviation operators, and pursuant to RCW 47.68.330;

(g) Announcements of executive clemency.

APPENDIX G